Mistakenly Renouncing the Right to Prosecute

Scots law's distinctive doctrine of renunciation of the right to prosecute, as crystallised in the 1976 case of *Thom v HM Advocate,*[1] holds that a statement by the public prosecutor that a prosecution is not to be brought for a particular offence binds the Crown. It can, therefore ground a plea in bar of trial of any subsequent attempt to prosecute. Such statements can even be general in nature, prospectively renouncing the right to prosecute an entire class of case.[2]

At first sight, the doctrine sits in tension with the Victims' Right to Review, whereby an alleged victim can request that the prosecutor review a decision not to prosecute or to discontinue a case.[3] In theory, however, the two can easily be reconciled. The prosecutor is not obliged to trigger a renunciation, and can simply say that a prosecution is not to be brought *for the time being*, making it clear that the Crown can later change its mind. A recent case sheds light on how the Crown (normally) avoids this tension, while throwing the potential conflict between renunciation and the Right to Review into focus.

A. *HM ADVOCATE v JM (No 2)*

[1] 1976 JC 48. See generally J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) ch 17. A review of this book by Sir Gerald Gordon ((2007) 11 Edin LR 284) generously suggested that this chapter "might encourage the courts to take up again the question of whether *Thom* should be reconsidered". We failed.

[2] See generally Chalmers and Leverick, *Criminal Defences* (n 2) paras 17.11-17.13. Most recently, the Lord Advocate has indicated that she would be prepared to make such a statement in respect of "simple possession offences committed within a pilot safer drugs consumption facility": Crown Office and Procurator Fiscal Service, "Statement on pilot safer drug consumption facility", 11 Sep 2023, available at *https://www.copfs.gov.uk/about-copfs/news/lord-advocate-s-statement-on-pilot-safer-drug-consumption-facility/*.

[3] See Crown Office and Procurator Fiscal Service, *Victims' Right to Review* (2023), available at *https://www.copfs.gov.uk/services/victim-services/victims-right-to-review/*.

In this case,[4] JM appeared on petition at Glasgow Sheriff Court charged with assault. A decision was reached that "no further action" should be taken.[5] The Glasgow depute with responsibility for the case then instructed that this decision be intimated to JM's agents. Crown Office procedures require that such an intimation should contain "a standard wording to ensure that it is clear that there is no renunciation of the Crown's right to prosecute",[6] while a "ready reckoner" provided to staff who work at the Crown Office National Enquiry Point states – the court notes, "in red" – "Do not advise the accused person of the no action/no further action marking decision. To do so could result in significant problems including an inability to take or re-raise proceedings…"[7]

What should never happen, happened. In response to an enquiry from JM's agents, a fiscal officer (a role described by the court as a "junior administrative grade") in the Glasgow procurator fiscal's office sent an unsigned email in the following terms:[8]

> "Good afternoon,
>
> There are to be no further proceedings in this case.
>
> Kind regards."

The email was sent two days after (but received before) a letter from the same office which used the standard wording, intimating that there would be no further action "at this time" but that the right to prosecute at a future date had been reserved.[9]

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[4] 2023 SLT 818.
[5] At [6]. The decision was taken by a senior procurator fiscal depute: the court explains at [5] that serious non-sexual cases which are not "destined for the High Court" are "not marked by Crown Counsel but by senior Procurators Fiscal Depute, known as indicters, under delegated authority".
[6] At [2], quoting COPFS Operational Instructions (No 23 of 2014).
[7] At [3], underlining in original.
[8] At [8].
[9] At [9].

The complainer successfully sought a review of the decision not to prosecute JM, with the advocate depute who reviewed the case being unaware of the fiscal officer's email. In turn, the sheriff sustained a plea in bar of trial by JM.[10] That decision was upheld by the High Court. There had been a "properly authorised decision not to prosecute the respondent", which the fiscal officer was "authorised to communicate".[11] The unqualified statement that there were to be no further proceedings could not be altered by a letter received at a later date.[12]

The court rejected an analogy with *HM Advocate v Weir*,[13] where a clerk confused two cases and wrote a letter to the wrong person renouncing the right to prosecute. There, the court said that the "logically prior question" was whether there had been any decision which could be intimated; there being no decision, there was no authority to send the letter and the letter could not bind the Crown.[14] That absence of a decision was not replicated in JM's case.[15]

B. THREE CRITICISMS

Three criticisms can be made of the decision in *JM (No 2).* First, the court draws no distinction between a decision not to prosecute (for the time being) and a decision to renounce the right to prosecute. JM's case, it is said, was "fundamentally different" from *Weir* because there had in fact been a decision not to prosecute JM.[16] That is correct, but there was no decision to *renounce* the right to prosecute JM. While the fiscal officer was "authorised to

[10] At [10].
[11] At [17].
[12] At [17].
[13] 2005 SCCR 821.
[14] *Weir* at [12].
[15] *JM (No 2)* at [16].
[16] At [17].

communicate decisions which had been duly made",[17] the decision which she communicated was – insofar as it renounced the right to prosecute – *not* that which had been made.

The court does not explain why the two types of decision are not to be distinguished. It might be argued that there are not really two types of decision at all – that anything short of a decision to renounce the right to prosecute is no decision, but merely a "statement of the intention of the Crown for the time being".[18] But if that were so, then the facts of *JM (No 2)* would be placed on all fours with *Weir*, there being no decision to be intimated.

An alternative approach might be to argue that renunciation is implicit in a decision to take no further action, and that special action must be taken to reserve the right to prosecute, by qualifying any intimation of the decision. But this leads to a second criticism: why *should* renunciation be taken as implicit? Parliament has expressly legislated for a scheme of review of decisions not to prosecute, placing the Lord Advocate under a duty to "make and publish rules about the process for reviewing, on the request of a person who is or appears to be a victim in relation to an offence or alleged offence, a decision of the prosecutor not to prosecute".[19]

This duty implies that decisions not to prosecute are *not* final and do *not* amount to renunciations, at least where there is a putative victim. If they were, the right to review would be undermined. Assigning such a default effect, therefore, runs contrary to the statute.

This is particularly so given that the statutory provisions were designed to implement provisions in a European Directive requiring that Member States ensure victims "have the right to a review of a decision not to prosecute".[20] Nothing in that Directive suggests that a

[17] At [17].
[18] *Thom v HM Advocate* 1976 JC 48 at 51.
[19] Victims and Witnesses (Scotland) Act 2014 s 4.
[20] Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, OJ 2012 L 315/57, art 11(1).

prosecutor should have the ability to exclude this right. Indeed, the Directive goes so far as to address the case where a decision "is taken by the highest prosecuting authority against whose decision no review may be carried out under national law", ensuring that a review is possible even in such cases by specifying that "the review may be carried out by the same authority".[21]

This, in turn, leads to a third criticism. The Victims' Right to Review is well-established and renunciations are not normal practice. Against the background of that right, can a terse, unsigned email such as that sent to JM's agents really be understood as representing a decision to renounce the right to prosecute (albeit his agents cannot be criticised for arguing that it had that effect)? This is even more true now that the decision in *JM (No 2)* has placed Crown Office internal procedures in the public domain. Now that these publicly available procedures make it explicit that renunciation is exceptional, does an email such as the one in this case not read on its face as an error?

C. CONCLUSION

The court's strict approach to applying the renunciation doctrine in *JM (No 2)* might be contrasted with the recent decision in *Barr v HM Advocate*[22] on extensions to the 12 month time bar in solemn prosecutions. There, the court emphasised that the question to be asked in such cases was: "where do the interests of justice lie?"[23] This, it was said, involved "a balancing of the interests of the accused in being brought to trial within the statutory time-limit with those of the complainer and the public in general in allowing the system of justice

[21] art 11(4).
[22] 2023 JC 79.
[23] At [22].

to determine the charges libelled on their substantive merits as opposed to on grounds that are essentially procedural in nature".[24]

No such balancing test applies in respect of renunciation: either the right has been renounced or it has not, and there is no scope to pray in aid the interests of the complainer and public in "allowing the system of justice to determine the charges libelled on their substantive merits". This illustrates the peculiarity of the renunciation rule.[25] Rather than engaging in something which might have the air of reviewing the exercise of prosecutorial discretion, the court confines itself to determining whether the prosecutor has validly fettered their own discretion.[26]

At present, Crown Office guidance on the victims' right to review includes the following caveat:[27]

> "On some occasions, we may have told the accused or their solicitor that the accused will not be prosecuted. If that is the case, we cannot prosecute the accused for that matter and so the decision cannot be reviewed."

One might fairly ask: why should it say this? Given that the Lord Advocate can be bound by public statements of prosecutorial policy,[28] should it not be open to the Lord Advocate to say, for example, that decisions not to prosecute are in all cases subject to the Victims' Right of Review and can never be regarded as renunciations until any request for review has been

[24] At [22].
[25] See Chalmers and Leverick, *Criminal Defences* (n 1) ch 19.
[26] Chalmers and Leverick, *Criminal Defences* (n 1) para 17.01.
[27] Crown Office and Procurator Fiscal Service (n 3).
[28] As the case law on general renunciations demonstrates: Chalmers and Leverick, *Criminal Defences* (n 1) paras 17.11-17.13.

disposed of,[29] or that a decision not to prosecute does not have the effect of *renouncing* the right to prosecute unless communicated in a prescribed form (more compelling than an unsigned email sent by a fiscal officer)? Such mechanisms could themselves be rejected by the court, and so the current practices outlined in *JM (No 2)* would have to continue. They might, however, provide a failsafe against administrative errors such as that which occurred in that case, and avoid the undermining of the victims' right to review which occurred there.

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[29] This might require the introduction of a time limit for requests into the policy (or at least a time limit for requests which could have the effect of negating what would otherwise be a renunciation). The suggestion here is only that such decision *could not* be regarded as renunciations before a request was disposed of or a time limit attached, not that they would *necessarily* be regarded as renunciations in such cases.